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Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of Video Description of Video Programming	)	MM Docket No. 99-339
	)	
	)	

REQUEST FOR STAY

MOTION PICTURE ASSOCIATION OF AMERICA

NATIONAL ASSOCIATION OF BROADCASTERS

NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

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EXECUTIVE SUMMARY

The Commission should stay the April, 1, 2002, effective date for its video description rules, 47 C.F.R. §§ 79.3 *et seq.*, until the U.S. Court of Appeals for the D.C. Circuit rules on the petition seeking review of the rules and the orders implementing them filed by the MPAA, the NAB, and the NCTA (collectively, the "Petitioners"). A scheduling order recently issued by the Court sets oral argument for September 6, 2002, meaning a decision will not issue until late 2002 or early 2003. If FCC rules that will require major broadcast and cable networks to add video descriptions to 50 hours of prime time or children's programming per quarter go into effect as scheduled, Petitioners' members will be required to make significant programming and engineering changes, in derogation the Communications Act and the First Amendment, just to comply with rules likely to be vacated on review.

The instant request satisfies the FCC standard for a stay. Petitioners are likely to succeed on the merits of their petition for review because the Commission clearly lacks statutory authority to adopt video description rules. The Act's new video accessibility provisions empower the FCC to adopt only closed captioning rules, while specifically withholding rulemaking authority for video descriptions. This is clear from the language and structure of Section 713, its legislative history, and traditional tools of statutory construction.

Though in seeking to rely on its general authority to nonetheless adopt video description rules the FCC implausibly found Section 713 "silent" on whether such action is authorized, its exercise of even this authority is also fatally flawed.

Any expansive reading of FCC authority over programming content is unreasonable as a general proposition, and conflicts both with the ultimate purposes of the Act and the means Congress prescribed for pursuit of them. Section 326 of the Act precludes FCC reliance on general rulemaking power to interfere with free speech by requiring the inclusion of video descriptions in broadcast fare, and Section 624(f) prohibits the regulation of cable services and programming absent express statutory authority. 47 U.S.C. §§ 326, 544(f). The video description rules also create constitutional tensions by compelling the creation of new scripts for covered programming in that, where acts of Congress can be read to either raise serious constitutional questions arise or to avoid such questions, the latter must prevail.

Petitioners will suffer irreparable harm if the video description rules are not stayed pending review. Petitioners' members will incur substantial equipment and programming costs if forced to implement video descriptions, and these costs will unrecoverable if the rules are vacated. By requiring Petitioners' members to engage in compelled speech, irreparable injury to First Amendment interests also will arise. In addition, since video description supplants other uses of the sole SAP channel currently available, such as Spanish-language audio, irreparable harm in the form of lost viewing opportunities and damage to viewer goodwill will result.

Briefly staying the effective date of the video description rules will not cause significant harm to other parties. The Commission has regulated television for more than 50 years without requiring video descriptions. Delaying enforcement for a few months to obtain a determination on the rules' legality will not cause great

harm. Moreover, existing voluntary video programming efforts will likely continue at their current pace. Finally, enforcing the video description rules prior to judicial review would disserve the public interest because they impose a new regulation of dubious legality that affects broadcast and cable content.

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The Motion Picture Association of America ("MPAA"), the National Association of Broadcasters ("NAB"), and the National Cable & Telecommunications Association ("NCTA"), Petitioners in *MPAA v. FCC*, No. 01-1149 (Mar. 28, 2001) (collectively, the "Petitioners"), 1/ hereby request the FCC to stay the April 1, 2002, effective date of its video description rules, 47 C.F.R. §§ 79.3 *et seq.*, until the United States Court of Appeals for the District of Columbia Circuit hears and decides Petitioners' request for review of the rules and the FCC orders implementing them.

On January 25, 2002, Petitioners received a scheduling order from the Court establishing September 6, 2002 as the date for oral argument in their challenge to the video description rules. *Order*, Nos. 01-1149 and 01-1155 (D.C. Cir., filed January 25, 2002). A decision following the argument typically would issue late in the fourth quarter of 2002 or early in the first quarter of 2003. How-

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1/ *Motion Picture Ass'n of America v. FCC, appeal docketed*, No. 01-1149 (D.C. Cir., docketed March 28, 2001), *seeking review of Implementation of Video Description of Video Programming*, MM Docket No. 99-339, Memorandum Opinion and Order on Reconsideration, 16 FCC Rcd. 1251 (2001) ("*Reconsideration Order*"), *aff'g on recon.*, Report and Order, 15 FCC Rcd. 15230 (2000) ("*Video Description Order*").

ever, the video description rules – which will require major broadcast and cable networks to add video description to 50 hours of prime time or children's programming per quarter – will go into effect on April 1, 2002. 47 C.F.R. § 79.3(c) (2000). Unless the effective date of the rules is stayed, Petitioners' members will be required to make significant programming and engineering changes to comply with rules that, as demonstrated below, are likely to be invalidated by the Court of Appeals.

If the rules become effective while Petitioners' appeal is pending, producers of broadcast and cable network programming, broadcast and cable networks, and local broadcast television stations and cable television systems will face significant consequences. Producers of broadcast and cable network programming will be compelled by a government mandate to create additional program material. Broadcast and cable networks and local broadcast television stations and cable television systems likewise will be compelled to transmit that new program material in conjunction with numerous programs. And current programming transmitted on the Secondary Audio Programming ("SAP") channel may be displaced. Such requirements entail obvious financial costs, and will significantly affect Petitioners' statutory and First Amendment rights.

These circumstances demand that the Commission postpone the effective date of the new video description rules pending judicial review. As demonstrated herein, Petitioners satisfy the four-part test for a stay traditionally employed by the Commission: (1) they will suffer irreparable harm if a stay is not granted; (2) they are likely to prevail on the merits of their court appeal; (3) a stay

would not harm other interested parties; and (4) a stay would serve the public interest. 2/ Accordingly, Petitioners respectfully urge the Commission to preserve the status quo and to stay the effective date of the video description rules pending a final decision by the Court of Appeals.

I. PETITIONERS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CHALLENGE TO THE FCC'S VIDEO DESCRIPTION RULES

The principal thrust of Petitioners' appeal is that the Commission lacks statutory authority to adopt the video description rules. In adopting the order under review, the Commission acknowledged that Section 713 of the Telecommunications Act of 1996 did not establish FCC rulemaking authority for video description (as Section 713(b)-(e) had done for closed captioning), and it claimed that congressional silence "by itself neither authorizes nor precludes" such action. *Video Description Order*, 15 FCC Rcd. at 15252-53; *see also Reconsideration Order*, 16 FCC Rcd. at 1271. The Commission asserted authority to adopt video description rules not under Section 713(f), but from the Communications Act's preface and the "more general rulemaking powers" in Sections 1, 2(a), 4(i) and 303(r) of the Act. *Id.* at 1270; *Video Description Order* 15 FCC Rcd. at 15251-52. The Commission reasoned it could exercise its general rulemaking authority absent a provision expressly prohibiting video description rules. *Id.* at 15253.

2/ *Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them*, 15 FCC Rcd. 7051, ¶ 7 (1999) (citing *Biennial Regulatory Review*, FCC 99-129, ¶4 (1999) (citing *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958))).

There can be little question that the appeal "raises serious questions going to the merits" upon which Petitioners are likely to prevail. *See Ohio ex rel. Celebrezze v. NRC*, 812 F.2d 288, 290 (6th Cir. 1987). These questions were central to the Commission's deeply divided decision to adopt the rules. Commissioners Powell and Furchtgott-Roth dissented from the Commission's order, reasoning that the Communications Act does not authorize the FCC to adopt video description rules, and in fact, can be fairly read only as denying authority to do so. *Video Description Order*, 15 FCC Rcd. at 15268-69 (Furchtgott-Roth, Comm'r, dissenting) ("Furchtgott-Roth Dissent"); *id.* at 15272-76 (Powell, Comm'r, dissenting) ("Powell Dissent"). Commissioner (now Chairman) Powell gave a detailed account of the legislative history and evolution of Section 713(f), and explained that the provision's chronology and basic precepts of statutory interpretation precluded a finding that the FCC could use general grants of authority to undertake what Congress otherwise disallowed. Powell Dissent, 15 FCC Rcd. at 15273-76. Commissioner Furchtgott-Roth agreed, adding that the inference of "purposeful limitation" is strengthened by juxtaposing the contemporaneous mandate for closed captioning rules with the very limited authority for video description. *See* Furchtgott-Roth Dissent, 15 FCC Rcd. at 15268.

Established rules of administrative law and statutory interpretation support this view. It is beyond dispute that "[a]n administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress." *FDA v. Brown & Williamson*, 529 U.S. 120, 161 (2000);

Lyng v. Payne, 476 U.S. 926, 937 (1986). Where "Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-843 (1984). This *Chevron* "track one" analysis applies where, as here, "Congress has directly spoken to the precise question at issue." If "traditional tools of statutory construction" reveal Congress had an intention on a specific provision, "that is the end of the matter." *Id.* On the other hand, if the statute is either silent or ambiguous with respect to "the precise question at issue," track two of *Chevron* asks whether the agency's action is based "on a permissible construction of the statute." *Id.* at 843. In this case, the Commission's adoption of video description rules fails both *Chevron* track one and track two analyses.

A. The Legislative History of Section 713 and Basic Rules of Statutory Construction Confirm That Congress Denied the FCC Authority to Adopt Video Description Rules

The plain language of Section 713 is the primary guide to Congress' intent with respect to video description. *Bell Atlantic Tel. v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997). Though the Act sets forth detailed requirements for FCC rules governing closed captioning in Sections 713(a)-(e), it included no comparable mandate for video description, but only directed the Commission in Section 713(f) to conduct a study and report to Congress. As a "cardinal canon" of statutory construction is that the "legislature says in a statute what it means and means in a statute what it says there," *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992), the difference between the detailed closed captioning mandates and the

absence of rulemaking authority for video description in Section 713(f) must be read as specific rejection by Congress of FCC rulemaking authority for video description.

In addition to the statutory language, the legislative history of the Telecommunications Act is clear that Congress specifically withheld rulemaking authority from the Commission as to video description. The House bill initially would have required the FCC to adopt *both* closed captioning and video description rules, *see* H.R. 3636 § 206, and was later amended in the final version of the bill to provide discretionary rulemaking authority for video description. *See* H.R. Conf. Rep. No. 104-458 at 184 (1996). However, the Senate bill directed the FCC only to report to Congress on the subject, and the Conference Committee adopted the Senate version, eliminating the House bill's video description rulemaking provision altogether. *Id.*

This is not, as the FCC majority assumed, congressional "silence" regarding video description. *See Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995) (quoting *Chevron*, 467 U.S. at 843). Congress fully considered and consciously rejected giving the FCC rulemaking authority, and was by no means "silent" in the *Chevron* sense. *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1088 (D.C. Cir. 1996); *Railway Labor Executives' Ass'n v. National Mediation Bd.*, 29 F.3d 655, 666 (D.C. Cir. 1994) (*en banc*), *amended*, 38 F.3d 1224 (D.C. Cir. 1994), *cert. denied*, 514 U.S. 1032 (1995). Indeed, "[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language," *INS v. Cardoza-*

Fonseca, 480 U.S. 421, 442-443 (1987). *See also Chickasaw Nation v. United States*, 122 S. Ct. 528, 534 (2001).

In this case, there can be no doubt that deletion of video description rulemaking authority in conference "strongly militates against a judgment that Congress intended a result that it expressly declined to enact." *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 199-200 (1974). Eliminating a House proposal in conference represents a "conscious choice" that shows congressional intent. *See North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 527-528 (1982). 3/ Indeed, next to language of "the statute itself," a conference report is regarded as "the most persuasive evidence of congressional intent," because it "represents the final statement of terms agreed to by both houses." *Demby v. Schweiker*, 671 F.2d 507, 510 (D.C. Cir. 1981).

In addition, the significant difference between the Act's detailed closed captioning mandates and the absence of rulemaking authority for video description indicates Congress did not merely overlook this issue or inadequately express its intent. Section 713 established detailed requirements for closed captioning of video programming, but no comparable mandate for video description. Specifically:

3/ *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562 (1982) ("Congress thus has rejected the very concept which petitioner seeks to have the Court judicially legislate."); *Russello v. United States*, 464 U.S. 16, 23-24 (1983) ("Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended."). *Cf. Brown & Williamson*, 529 U.S. at 144 (FDA lacks authority to regulate tobacco products as "drugs" or "devices" where "Congress considered and rejected bills that would have granted the FDA such jurisdiction").

- Section 713(a) required completion of a closed captioning inquiry and an FCC report to Congress within 180 days of the Act's passage.

- Sections 713(b) and (c) required the Commission to prescribe closed captioning regulations and established compliance deadlines.

- Sections 713(d) and (e) established exemptions from closed captioning, including an exemption for "undue burdens," and set forth detailed criteria by which the FCC must consider such requests.

In sharp contrast, Sections 713(g) and (f) – the sole subsections dealing with video description – merely defined "video description" and required the FCC to prepare a report to Congress. 47 U.S.C. §§ 613(g), (f).

By adopting video description rules in the face of these vastly different statutory provisions, the Commission disregarded a basic canon of statutory construction, *expressio unius est exclusio alterius*. That is, where a statute provides authority for an action, but is silent as to a similar, related action, it must be interpreted as authorizing only the former. *See, e.g., NextWave Personal Communications, Inc. v. FCC*, 2001 WL 702069 *21 (D.C. Cir. 2001); *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978). "A statute listing the things it does cover exempts, by omission, the things it does not list. As to the items omitted, it is a mistake to say that Congress has been silent. Congress has spoken – these are matters outside the scope of the statute." *Original Honey Baked Ham Co. v. Glickman*, 172 F.3d 885, 887 (D.C. Cir. 1999). "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the

disparate inclusion and exclusion." *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991). Here, the Commission majority disregarded established principles of statutory construction which hold that Congress uses language purposely, and its decision to include a specific mandate for closed captioning while omitting it for video description should be respected. *Russello*, 464 U.S. at 22-23. 4/

Petitioners are likely to succeed on the merits under *Chevron* track one because Congress expressed its clear intention to withhold rulemaking authority from the FCC. Where legislative intent is clear, as it is in this case, it is unnecessary even to conduct a *Chevron* track two analysis. *E.g.*, *Halverson*, 129 F.3d at 184. However, as demonstrated in the following subsection, Petitioners are likely to prevail on the merits under *Chevron* track two as well.

B. The Commission Improperly Relied on General Rulemaking Authority to Adopt Video Description Rules

Although the Commission majority acknowledged that Section 713 includes no provision permitting – much less requiring – video description rules, it improperly took this to mean that the provision "by itself neither authorizes nor precludes" such action, 5/ and asserted authority to adopt video description rules

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4/ *See also Shook v. District of Columbia Financial Responsibility and Mgmt. Assistance Auth.*, 132 F.3d 775, 782 (D.C. Cir. 1998); *Halverson v. Slater*, 129 F.3d 180, 185 (D.C. Cir. 1997); *Ethyl Corp. v. EPA*, 51 F.3d at 1061; *Michigan Citizens for an Ind. Press v. Thornburgh*, 868 F.2d 1285, 1292-93 (D.C. Cir.), *aff'd by equally divided court*, 493 U.S. 38 (1989).

5/ *Video Description Order*, 15 FCC Rcd. at 15252-53; *see also Reconsideration Order*, 16 FCC Rcd. at 1271.

under its "more general rulemaking powers." 6/ However, the FCC's general rulemaking power in "Title I is not an independent source of regulatory authority; rather, it confers on the FCC only such power as is ancillary to [its] specific statutory responsibilities." *California v. FCC*, 905 F.2d 1217, 1240 n.35 (9th Cir. 1990) (citing *United States v. Southwestern Cable Co.*, 392 U.S. 157, 158 (1968)). As the D.C. Circuit has pointed out, "it will not do for an agency to invoke the broad purposes of an entire act in order to contravene Congress' intent embodied in a specific provision of [a] statute." *International Brotherhood of Teamsters v. ICC*, 801 F.2d 1423, 1429-30 (D.C. Cir. 1986), *different result reached on reh'g*, 818 F.2d 87 (D.C. 1987) (original decision mooted by subsequent legislation). *See California v. FCC*, 905 F.2d at 1240 n.35 ("The system of . . . regulation established by Congress cannot be evaded by the talismanic invocation of the Commission's Title I authority.").

Here, the Commission cannot reasonably assert authority to make rules simply because the Act "does not expressly negate the existence of a claimed administrative power (*i.e.*, when the statute is not written in 'thou shalt not' terms)." *Railway Labor Executives' Ass'n*, 29 F.3d at 655, 671. Were the FCC to "presume a delegation of power absent an express withholding of such power, [it] would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well." *Railway Labor Executives*, 29 F.3d at 671; *see also Comsat Corp. v. FCC*, 114 F.3d 223, 227 (D.C. Cir. 1997).

6/ *Reconsideration Order*, 16 FCC Rcd. at 1270; *Video Description Order*, 15 FCC Rcd. 15251-52.

Such an unlimited assertion of authority is patently unreasonable. Any claim that the FCC has plenary authority to adopt programming or any other requirements both for broadcasters and cable programmers unless Congress vetoes particular rules "comes close to saying that [it] has the power to do whatever it pleases merely by virtue of its existence," a construction of law courts have variously described as "incredible" and "tortured." *University of the Dist. of Columbia Faculty Ass'n/NEA v. District of Columbia Fin. Responsibility and Mgmt. Assistance Auth.*, 163 F.3d 616, 621 (D.C. Cir. 1998) (citation omitted). This theory of FCC jurisdiction usurps legislative power and provides "no logical stopping point." *Independent Insurance Agents of America, Inc. v. Hawke*, 211 F.3d 638, 645 (D.C. Cir. 2000) (such expansive authority would enable regulatory agencies "to constantly expand their field of operations on an incremental basis without congressional action"). 7/ As then-Commissioner Powell pointed out in his dissent, there is no basis for such an open-ended delegation of power, as Congress "surely did not obligate itself in the future to the Herculean task of specifically prohibiting any possible action by the Commission when it crafts new laws in any area within the scope of section 1." Powell Dissent, 15 FCC Rcd. at 12574.

The FCC's approach also is inconsistent with the ultimate purposes of the Act with respect to content controls. The Commission always has had to "walk a

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7/ *Ethyl Corp. v. EPA*, 51 F.3d at 1060 (courts will not "presume a delegation of power merely because Congress has not expressly withheld such power"); *see also Shook*, 132 F.3d at 782; *Halverson*, 129 F.3d at 185; *Oil, Chemical and Atomic Workers Int'l Union, AFL-CIO v. NLRB*, 46 F.3d 82, 90 (D.C. Cir. 1995); *Railway*

'tightrope'" to preserve the free speech values embedded in the Act, a balancing act the Supreme Court has described as "a task of great delicacy and difficulty." 8/ By adopting video description rules without specific congressional authorization, the Commission discarded its traditional caution regarding content controls and embraced a regulatory mandate limited only by its notions of "good" programming. Such an approach is at odds with the Communications Act. As the Supreme Court has pointed out, "the FCC's oversight responsibilities do not grant it the power to ordain any particular type of programming that must be offered by broadcast stations." *Turner Broadcasting Sys. v. FCC*, 512 U.S. 622, 652 (1994). Similarly, the Act does not provide general authority to regulate cable programming. *FCC v. Midwest Video Corp.*, 440 U.S. 689, 706-707 (1979) ("the Commission was not delegated unrestrained authority" over programming); *Home Box Office v. FCC*, 567 F.2d 9, 28 (D.C. Cir. 1977) (rejecting ancillary authority for FCC to impose cable content controls).

In particular, the Commission's claim of general rulemaking authority cannot trump specific statutory limits, since the general provisions empower the Commission only to adopt rules "not inconsistent with law." 9/ For example, Section

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Labor Executives' Ass'n, 29 F.3d at 671; *Natural Res. Def. Council v. Reilly*, 983 F.2d 259, 266 (D.C. Cir. 1993).

8/ *CBS, Inc. v. DNC*, 412 U.S. 94, 102, 117 (1973); *cf., Arkansas AFL-CIO v. FCC*, 11 F.3d 1430, 1443 (8th Cir. 1993) (*en banc*) (Arnold, C.J., concurring) ("There is something about a government order compelling someone to utter or repeat speech that rings legal alarm bells.").

9/ *See, e.g.*, 47 U.S.C. § 154(i) ("[t]he Commission may . . . make such rules and regulations, and issue such orders, *not inconsistent with this Act*, as may be

326 of the Act, which prohibits censorship and denies to government the power to interfere with "free speech by means of radio communication," 47 U.S.C. § 326, demonstrates "a legislative desire to preserve values of private journalism." *Midwest Video Corp.*, 440 U.S. at 704. Likewise, Section 624(f) of the Act "limits the authority of the FCC . . . to regulate the provision or content of cable services *other than as provided in this new title of the Communications Act.*" H.R. Rep. No. 934, 98th Cong., 2d Sess. 70 (1984) (emphasis added). *See* 47 U.S.C. § 544(f). 10/ This section prohibits regulations regarding the "provision *or* content" of cable services, except as otherwise specified in the Act. *See MediaOne Group, Inc. v. County of Henrico, Virginia*, 97 F. Supp.2d 712, 716 (E.D. Va. 2000) ("imposition of requirements regarding both the 'provision' and the 'content' of cable services violate[s] Section 544(f)"), *aff'd on other grounds*, 257 F.3d 356 (4th Cir. 2001). Section 624(f) simply leaves no room for an assertion of ancillary rulemaking authority. 11/

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necessary in the execution of its functions") (emphasis added); 47 U.S.C. § 303(r) ("the Commission from time to time, as public convenience, interest, or necessity requires shall . . . [m]ake such rules and regulations and prescribe such restrictions and conditions, *not inconsistent with law*, as may be necessary to carry out the provisions of this Act . . . .") (emphasis added).

10/ Without discussion, the *Video Description Order* cites *United Video, Inc. v. FCC*, 890 F.2d 1173 (D.C. Cir. 1989), to support the proposition that Section 624(f) bars only viewpoint-based regulations or rules that would prescribe by title which programs must be transmitted. But *United Video* applied Section 624(f) in the very different context of copyright-based rules that predated the Cable Act. Moreover, the *United Video* court stressed that Section 624(f) forbids extra-statutory requirements "that particular programs *or types of programs* be provided" and it noted that Section 624(f) indicates "Congress thought that a cable company's owners, not government officials, should decide what sorts of programming the company would provide." *Id.* at 1189.

11/ Petitioner NAB does not join in this argument relating to Section 624(f).

C. Video Description Rules Are Inconsistent With the First Amendment

In addition to the foregoing analysis, the Commission's assertion of plenary authority to regulate programming content is an unreasonable interpretation of the Act because it raises significant tensions with the First Amendment. Where a statute "is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *Jones v. United States*, 526 U.S. 227, 239 (1999) (internal citations omitted). Reviewing courts will reject an agency interpretation of a statute that would ordinarily receive deference under *Chevron* track two if the agency's reading raises serious constitutional doubts. *Texas Office of Pub. Utils. Council v. FCC*, 183 F.3d 393, 443 (5th Cir. 2001). They do so with the understanding that "Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority." *Solid Waste Agency v. United States Army Corps. of Engineers*, 121 S. Ct. 675, 683 (2001).

Here, the constitutional tensions are obvious. *See Anti-Defamation League of B'nai B'rith v. FCC*, 403 F.2d 169, 172 (D.C. Cir. 1968) ("the First Amendment demands that [the FCC] proceed cautiously [in reviewing programming content] and Congress . . . limited the Commission's powers in this area"). In addition, the video description rules create a constitutional problem of a more serious nature than the usual conflict over FCC programming authority. The rules adopted by the Commission likely violate the constitutional prohibition against compelled

speech because they require programmers to create new derivative works. 12/ Just as the First Amendment limits the government's ability to restrict what a person can say, it also prevents the government from forcing a speaker to communicate. 13/

The majority incorrectly concluded that the video description rules merely "require a programmer to express what it has already chosen to express in alternative format," and that such rules "are comparable to a requirement to translate one's speech into another language." *Report and Order*, 15 FCC Rcd. at 15255. As noted, video description is a creative work, not a mere "translation" or "expression in an alternate format." In any event, a translation is a derivative work under copyright law, which makes it an "original work of authorship." 14/ Under

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12/ As the Commission has noted, video description requires entirely new scripts to be written, *Video Accessibility Report*, 11 FCC Rcd. at 19221-22, and actors must hired to read the new text and the soundtrack synchronized. *See* Powell Dissent, 15 FCC Rcd. at 15278 ("It is important to note that video description is a creative work. It requires a producer to evaluate a program, write a script, select actors, decide what to describe, decide how to describe it and choose what style or pace.").

13/ *Riley v. National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796-797 (1988) ("'freedom of speech,' . . . necessarily compris[es] the decision of both what to say and what not to say."); *Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards*, 8 FCC Rcd. 8798, ¶ 77 (1993) (citing *PG&E v. California Pub. Serv. Comm'n*, 475 U.S. 1 (1986)); *see Hurley v. Irish-American Gay Group*, 515 U.S. 557, 573 (1995); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

14/ 17 U.S.C. § 101 (defining "derivative work" as "a work based upon one or more existing works, such as a translation . . . ."); *see also Radji v. Khakbaz*, 607 F. Supp. 1296 (D.D.C. 1985) (noting that 17 U.S.C. § 106(2) "gives the copyright holder the exclusive right to prepare derivative works, which includes the right to make translations").

the First Amendment a person's choice of language – the decision whether to "translate" his speech, or not – is protected speech. 15/

Taken together, these arguments clearly establish Petitioners' likelihood of success on the merits. A stay of FCC rules to preserve the status quo is especially appropriate where, as here, the Commission rules regulate content and touch on First Amendment concerns. Such stays often have been granted in cases involving regulations that directly or indirectly affect programming. 16/ The same approach should be taken here.

15/ *See Yniguez v. Arizonans for Official English*, 69 F.3d 920, 935 (9th Cir. 1995) (*en banc*) ("Language is by definition speech, and the regulation of any language is the regulation of speech."), *vacated on other grounds*, 520 U.S. 43 (1997); *id.* at 937-938 (government cannot prohibit people "from speaking in the tongue of their choice") (citing *Meyer*, 262 U.S. 390, 401 (1923)); *see also Ruiz v. Hull*, 957 P.2d 984 (Ariz. 1998) (*en banc*) (same); *cf.*, *Meyer v. Nebraska*, 262 U.S. 390; *Farrington v. Tokushige*, 273 U.S. 284 (1927).

16/ *See Alliance for Community Media v. FCC*, 10 F.3d 812, 816 (D.C. Cir. 1994) (noting that FCC rules governing cable access channels were stayed pending review), *aff'd in part, rev'd in part, Denver Area Educ. Television Consortium v. FCC*, 518 U.S. 727 (1996) (intervening subsequent history omitted); *id.* at 831 (ordering stays continued pending completion of proceeding on remand to FCC); *Daniels Cablevision, Inc. v. United States*, 835 F.Supp. 1, 12 (D.D.C. 1993) (staying further proceedings before District Court pending completion of proceedings on appeal in view of "controlling questions of law . . . as to which there is substantial ground for difference of opinion"), *aff'd in part, rev'd in part sub nom, Time Warner Entm't Co. v. United States*, 211 F.3d 1313 (D.C. Cir. 2000), *cert. denied*, 531 U.S. 1183 (2001); *Action for Children's Television v. FCC*, 932 F.2d 1504, 1507 (D.C. Cir. 1991) (enforcement of broadcast indecency ban stayed), *cert. denied*, 503 U.S. 913 (1992).

II. PETITIONERS WILL SUFFER IRREPARABLE HARM IF THE FCC DOES NOT STAY THE EFFECTIVE DATE OF THE VIDEO DESCRIPTION RULES

The Commission has recognized that, even absent a finding of likelihood of success on the merits, granting a stay to maintain the status quo is appropriate where a serious legal question is presented, denial of a stay would inflict serious harm, and little harm would befall others. *See, e.g., Hickory Tech Corp.*, 13 FCC Rcd. 22085, 22086, ¶ 3 n.9 (1998) (citing *Washington Metro. Area Transit Comm'n v. Holiday Tours*, 559 F.2d 841, 843 (D.C. Cir. 1977)). While Petitioners' statutory and constitutional claims set forth above raise serious questions about the FCC's authority to adopt video description rules, it also is clear that Petitioners will suffer "irreparable injury [that] is . . . actual and not theoretical, and that the harm will in fact occur." *Wisconsin Gas Co. v. FERC*. 758 F.2d 669, 674 (D.C. Cir. 1985) (internal quotation omitted).

Enforcement of the video description rules prior to a ruling on their legality would impose significant, irreparable burdens on Petitioners' members. The rules will require that the four largest broadcast networks and the five most watched cable networks provide at least 50 hours of programming (either prime time or children's programming) with video description per quarter. Assuming the Court of Appeals issues a decision by the end of the year, the FCC rules will require video description of at least 1350 hours of programming in the last three quarters of 2002.

The record before the Commission indicated that the cost of adding video description ranges from one to four thousand dollars per hour. *Closed*

Captioning and Video Description of Video Programming, Report to Congress, 11 FCC Rcd. 19214, 19258 (1996); Comments of WGBH at 15-16. Consequently, costs of adding video description to programs alone could range from $1,350,000 to $5,400,000 over the three calendar quarters beginning April 1. Once these costs are incurred they cannot be recovered. These costs will be incurred by program producers in the case of new, original programming (the staple of broadcast prime time and an increasing element of cable network programming), or by cable and broadcast networks for motion pictures and other programming originally produced and distributed without video description.

Moreover, the foregoing represents only the per-program incremental costs of video description. The cost to broadcast networks for modifying their origination facilities and satellite distribution systems in order to distribute video described programming to their affiliates has been estimated to run into the millions of dollars. *See* NAB Comments at 15-17. In addition, the vast majority of network-affiliated stations required to provide video description would also need to modify or reconstruct their studio plants and transmitters to receive and route the network's described programming, at an estimated average cost of over $160,000 per station. NAB Petition at 6-7, n.6. 17/ The estimated cost of cable network hardware and systems adjustments and additions that may be necessary to provide

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17/ *See also* NAB *Ex Parte* Submission in MM Docket No. 99-339 (July 7, 2000) at 1. Notably, these costs would be incurred for soon-to-be obsolete analog facilities. NAB Petition at 7.

video descriptions ranges from $100,000 to more than $200,000 per network. NCTA Comments at 14-15.

The Commission has held that a stay is appropriate in order to prevent "irretrievable financial losses" to a party. 18/ And while economic harm may not constitute irreparable harm in every case, *Celebrezze*, 812 F.2d at 290, it clearly provides sufficient injury here, where the costs impose a burden on speech. *E.g.*, *Playboy Entertainment Group, Inc. v. United States*, 30 F. Supp.2d 702, 711-712 (D. Del. 1998) (the economic impact of content regulation serves as a quantitative measure of lost First Amendment opportunities), *aff'd, United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000). Even in the absence of significant financial consequences, it is beyond dispute that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *E.g.*, *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

Finally, broadcasters and cable systems that currently use the SAP channel to provide alternative audio programming, most notably Spanish language translations of the accompanying show, may be affected by the video description requirements. 19/ At least some Spanish-language programming, and other programming that uses alternate audio, could be supplanted by programs bearing government-mandated video descriptions. *Video Accessibility Report*, 11 FCC Rcd

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18/ *See, e.g., Virgin Islands Telephone Corp.*, 7 FCC Rcd. 4235, ¶ 13 (1992); *Communications Satellite Corp.*, 3 FCC Rcd. 2643 (1988).

19/ *Video Description Reconsideration Order*, 16 FCC Rcd. at 1266 ("no technical solution to allow two uses of the SAP channel simultaneously is currently available").

at ¶ 21 ("Unlike . . . [closed] captioning, there is no dedicated or reserved transmission capacity for video descriptions[, so] it competes with second language transmissions, including Spanish language, for use of the SAP channel."). This constitutes irreparable harm not just to the viewers, but to Petitioners' customer goodwill as well. *Dominion Video Satellite, Inc. v. EchoStar Satellite Corp.*, 269 F.3d 1149, 1156 (10th Cir. 2002) (loss of reputation and good will constitute sufficient irreparable harm to justify preliminary injunction).

III. NO PARTY WILL SUFFER HARM IF THE COMMISSION STAYS THE EFFECTIVENESS OF ITS VIDEO DESCRIPTION RULES

The FCC has regulated television for more than 50 years without ever imposing video description requirements. Deferring implementation of the rules for the few calendar quarters the court takes to complete its review of the video description rules will simply preserve the status quo and will cause no harm. Parties who potentially would benefit from the provision of additional video description under government mandate will not, prior to April 1, 2002, have received, or come to rely upon, video described programming not currently being provided. Meanwhile, the organizations that currently provide video descriptions voluntarily will likely continue to do so at much the same pace. Thus, there will be no net loss of video described programming during the time the rules are stayed. The denial of a benefit, enhancement, or convenience falls well below the threshold of harm required to preclude a stay. *Iowa Utils. Bd. v. FCC*, 109 F.3d 418 (8th Cir. 1996) (subsequent history omitted).

In addition, it is far from universally accepted, even among members of the visually-impaired community, that there is *any* need – let alone an urgent one – for the implementation of federal rules requiring video description of entertainment programming. *See* National Federation of the Blind Petition for Reconsideration at 7 ("The Commission's choice of described entertainment over accessible information is a misperception of the need coupled with an offensively meaningless solution to address it."). Consequently, the third factor for granting a stay is satisfied.

IV. STAYING THE EFFECTIVE DATE OF THE VIDEO DESCRIPTION RULES WILL SERVE THE PUBLIC INTEREST

The Commission cannot reasonably assert that it serves the public interest to enforce regulations that it has neither the statutory or constitutional authority to enforce. In an important sense, therefore, the fourth factor merges with the first criterion for granting a stay because the question in this case is whether the Commission has the public interest authority to impose the rules under review. If it appears likely that the FCC does not have such authority, it is difficult for the Commission to argue that enforcing the rules pending judicial review would serve the public interest.

To the contrary, enforcing the rules prior to judicial review would disserve the public interest because the video description rules impose a new regulation of dubious legality affecting broadcast and cable content. As the Supreme Court has stressed, "the 'public interest' standard necessarily invites reference to First Amendment principles." *CBS* v. *DNC*, 412 U.S. at 122; *FCC v. League of Women Voters of California*, 468 U.S. 364, 381 (1984) (First Amendment

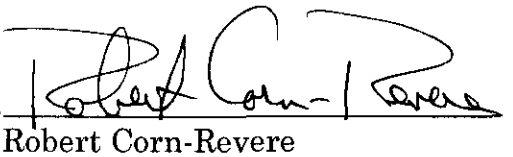
"requires a critical examination of the interests of the public and broadcasters in the light of the particular circumstances of each case"). As described above, the rules under review impose significant burdens on Petitioners' members and raise significant questions under the compelled speech doctrine. Accordingly, preserving the status quo until the Court of Appeals rules on the important constitutional and statutory questions at issue would serve the public interest. *See supra* note 16.

Finally, where a party has shown a substantial likelihood of success on the merits – as Petitioners have done here – the strength of that showing makes consideration of other factors less important. *Washington Metro Area Trans. Auth.*, 559 F.2d at 843-844. In any event, Petitioners have satisfied all four criteria for granting a stay in this case.

CONCLUSION

For the foregoing reasons, Petitioners request that the Commission stay the effective date of its video description rules, scheduled to go into effect on April 1, 2002, pending a final decision from the United States Court of Appeals for the District of Columbia Circuit in *MPAA, et al. v. FCC.*

Respectfully submitted,

By: 

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February 22, 2002

Certificate of Service

I hereby certify that on this 22nd day of February, 2002, copies of the foregoing Request for Stay were sent by hand, facsimile, or first-class mail to:

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